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4 **UNITED STATES DISTRICT COURT**  
5 **EASTERN DISTRICT OF CALIFORNIA**  
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7 **THERESA BROOKE,**

8 **Plaintiff**

9 **v.**

10 **SUPERB HOSPITALITY, LLC, d/b/a**  
11 **Fairfield Inn & Suites Selma/Kingsburg,**

12 **Defendants**

**CASE NO. 1:20-CV-0103 AWI SAB**

**ORDER ON MOTIONS FOR  
SANCTIONS, MOTION TO DISMISS,  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT, RULE 56(d) MOTION  
FOR RELIEF, AND MOTION TO  
AMEND**

(Doc. Nos. 44, 53, 54, 64)

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14 This unusually contentious matter is brought by Plaintiff Theresa Brooke against  
15 Defendant Superb Hospitality, LLC d/b/a Fairfield Inn & Suites Selma/Kingsburg (“Superb”).  
16 The operative complaint is the First Amended Complaint (“FAC”), which seeks relief under Title  
17 II of the Americans with Disabilities Act (42 U.S.C. § 12181 et seq.) (“ADA”) and California  
18 Civil Code §§ 51, 52 (“Unruh Act”). Currently before the Court are three motions for sanctions  
19 (two under Rule 11 and one pursuant to 28 U.S.C. § 1927), a combined Rule 12(b)(1), Rule  
20 12(b)(6), and alternative Rule 56 partial summary judgment motion, a Rule 56(d) motion, and a  
21 motion to amend. Briefing on all motions have now been received. This motion disposes of the  
22 non-sanctions motions.  
23

24 **FACTUAL BACKGROUND**

25 From the FAC, Brooke resides in Arizona but also has an office for purposes of ADA  
26 testing in California. At all relevant times, Brooke has been legally disabled and confined to a  
27 wheel chair due to a loss of a leg. Because Brooke ambulates by use of a wheelchair, she can only  
28

1 rent a mobility accessible hotel room. Brooke and her husband are avid travelers to California.  
2 Brooke travels to California for leisure, to participate in judicial proceedings, and to conduct site  
3 inspections to determine if various hotels comply with disability access laws and settlements.  
4 Brooke is an ADA serial tester who intends to check Superb for compliance in the near future.

5 At an unknown time, Brooke visited Superb's website to rent rooms and check compliance  
6 with disability access rules. Brooke wanted to rent a one-bedroom suite, which is the sole suite  
7 offered at Superb's hotel ("the Hotel") and offers more living space, better views, and more  
8 luxurious amenities than Superb's standard rooms. The sole accessible rooms offered at the Hotel  
9 are standard rooms, which are not comparable to the suites offered at the Hotel. In other words,  
10 Superb does not provide the same room-type choices to disabled Americans as it does for able-  
11 bodied persons. Section 224.5 of the 2010 Standards of Accessible Design ("SAD") requires that  
12 hotels "shall provide choices of guest rooms, number of beds, and other amenities comparable to  
13 the choices provided to other guests." Had Superb provided comparable choices as those offered  
14 to able-bodied persons, Brooke would have booked a room. However, because Brooke knew that  
15 she could not obtain a suite, she was deterred from visiting Superb and will not visit the Hotel  
16 until it makes a suite accessible.

17 Brooke alleges that prior to filing this lawsuit, she took a screenshots of "Superb's  
18 website." The webpage for the One Bedroom Suit indicates that it has no accessible features.  
19 Further, "Superb's website" indicated that the Hotel had six room-types available, only one of  
20 which was a suite. However, during the pendency of this case, Defendant "hid" the One Bedroom  
21 Suite from the "Rooms" tab of the website, reduced the number of room-types available from six  
22 to five, and changed the names of the room types. Moreover, despite removing the One Bedroom  
23 Suite from the "Rooms" tab, elsewhere on the website the Hotel is described as having 3 floors, 64  
24 rooms, and 22 suites. Brooke alleges that using the Wayback Machine and other IT methods  
25 demonstrates that "Superb's website" was altered. According to the Wayback Machine,  
26 Defendant used to have six room-types, including the One Bedroom Suite.<sup>1</sup>

27  
28 <sup>1</sup> Brooke has included screenshots from what is alleged to be Superb's then existing website and screenshots from the Wayback Machine. See FAC at pp. 5-8.

Finally, Brooke alleges that other barriers exist at the Hotel. For example, the Hotel does not have an access aisle at the lobby loading zone. However, Brook alleges that she will bring that action when she has an opportunity to inspect the premises.

**I. DEFENDANT’S RULE 12(b)(1) MOTION<sup>2</sup>**

*Defendant’s Arguments*

Superb argues *inter alia* that, per declarations filed in February, April , and May 2020, this case is moot. Declarations from the general manager of the Hotel and a Vice President of Superb confirm that a One Bedroom Suite is no longer offered or available at the Hotel to anyone. The Hotel only had a single One Bedroom Suite on the property (Room 335), but that room was modified as of February 17, 2020, through the removal of a door so that it is now a King Studio room. The only difference between a One Bedroom Suite and an Accessible King Studio room is a door and partial wall between the bedroom and living area. An Accessible King Studio room has been available at the hotel since 2012. The Accessible King Studio is larger than the One Bedroom Suite, has all of the same features and amenities, and has a comparable view (as it is located just seven doors down from Room 335). There are also two other premium rooms that are accessible, an Accessible Queen Studio and an Accessible Spa King. Thus, contrary to the allegations, there are and were comparable rooms to the One Bedroom Suite that were available to Brooke, which complies with SAD § 224.5. With the elimination of the One Bedroom Suite through a physical alteration, the absence of an actual violation of the SAD, and given the ease with which Brooke could check whether a One Bedroom Suite will be offered for rent through a computer or smart phone search and a resulting screen shot, there is no reasonable likelihood that the Room 335 King Studio will be altered and once again be offered as an inaccessible One Bedroom Suite. Finally, Superb argues that its sworn declarations demonstrate that it does not own or control any websites. All information found on the websites cited are from third parties.

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<sup>2</sup> Superb contends that the Court lacks subject matter jurisdiction for several reasons. Because the Court finds that Superb’s arguments regarding mootness of the ADA claim and the absence of standing regarding the Unruh Claim are dispositive, the Court limits its discussion and analyses to those issues.

1        Plaintiff's Opposition

2        Brooke argues, *inter alia*, that at this stage of the litigation, it is inappropriate to consider  
3 or address extrinsic evidence for the purpose of ruling on the pending motions. With respect to  
4 whether Superb still has One Bedroom Suites, that is a statutory standing requirement that is  
5 intertwined with the merits of the case. In such a situation, *Safe Air for Everyone v. Meyer*, 373  
6 F.3d 1035, 1039 (9th Cir. 2004) dictates that a Rule 12(b)(6) analysis must be made instead of a  
7 Rule 12(b)(1) analysis. Under Rule 12(b)(6), consideration of extrinsic evidence is inappropriate.

8        Brooke also argues that Superb's motion focuses on the alleged remediation of one suite.  
9 However, "Superb's website" lists 22 suites at the Hotel, and the FAC alleges that there are a total  
10 of 22 inaccessible suites. The motion does not address any actions towards the remaining 21  
11 suites.

12        Finally, Brooke argues that Superb fails to meet its heavy burden of demonstrating  
13 mootness through voluntary cessation. Superb offers no proof that its "unbelievable" changes to  
14 the One Bedroom Suite is permanent. There is no proof that the inaccessible room will not be  
15 renamed after litigation is over or that Superb will not change the website to again advertise a One  
16 Bedroom Suite. There is also no physical proof that shows the change to the Suite. There is also  
17 no proof that the website, which previously listed 22 inaccessible suites but is now claimed to be a  
18 mistake, cannot be easily changed back after this case is over. Further, it should be noted that  
19 alleged sole suite was converted on February 18, 2020, which is the same date that the Clerk made  
20 an entry of default and the same date that Superb filed its motion to dismiss. Therefore, Defendant  
21 has not met its burden.

22        Relevant Declarations

23        1.        Ritu Portugal

24        Portugal is a Vice President of Superb. See Doc. No. 8-16 at ¶ 2. In relevant part,  
25 Portugal declares: (1) the Hotel was built in 2010; (2) Superb does not own, lease, or control any  
26 website; (3) Superb does not have a website or similar internet presence whereby one could learn  
27 about the Hotel or book a room; (3) Superb has no right to change any website or internet presence  
28 through which the public could learn about the Hotel or rent rooms; (4) as a Fairfield Inn location,

rooms at the Hotel may be rented through the franchisor's website; (5) Superb is limited to asking the owners or operators of travel websites and the franchisor's website to make changes; (6) requested changes must be approved by the franchisor; (7) the allegation that the sole accessible rooms at the Hotel are standard rooms is untrue as there are Accessible King Studio, Accessible Queen Studio, and Accessible King Spa rooms available for rent; (8) compared to the One Bedroom Suite, the Accessible King Studio is seven square feet larger, has substantially the same views (being only 7 doors apart) and amenities, and does not have a full wall between the bedroom and sitting area in order to provide greater clearance and accessibility; (9) an Accessible King Studio has been available since 2010; (10) with the removal of the door, the One Bedroom Suite (Room 335) will be offered as a King Studio because it materially meets the requirements of that room type and no longer meets the requirements of a One Bedroom Suite; (11) the sole One Bedroom Suite in the hotel was Room 335; (12) because Room 335 has now been converted to a King Studio, Superb will not rent Room 335, or any other room, as a One Bedroom Suite or any similar designation; and (13) the one exception might be if a Certified Access Specialist confirms that an accessible room of a type which is presently not offered for rental meets all applicable accessibility requirements, Superb might consider offering rooms of that type to the public, but presently has no plans to do so. See Doc. No. 8-16.

2. Abel Perez a.k.a. Avel Fuentez

Perez is the general manager of the Hotel. See Doc. No. 8-7 at ¶ 2. In relevant part, Perez declares that: (1) the allegation that the sole accessible rooms offered are standard rooms is false, as there are Accessible King Studio, Accessible Queen Studio, and Accessible King Spa rooms available for rent; (2) compared to the One Bedroom Suite, the Accessible King Studio is seven square feet larger, has substantially the same views (being only 7 doors apart), and does not have a full wall between the bedroom and sitting area in order to provide greater clearance and accessibility; (3) with the removal of the door, the One Bedroom Suite (Room 335) is now required to be and will be offered as a King Studio because it no longer meets the requirements of a One Bedroom Suite and most closely meets the requirements of a King Studio; (4) because the sole One Bedroom Suite (Room 335) no longer meets the requirements to be offered as a One

1 Bedroom Suite, there is no longer any One Bedroom Suites available at the Hotel, regardless of  
 2 disability; and (5) the amenities/features of the One Bedroom Suite and the Accessible King  
 3 Studio are materially the same. See id. at ¶¶ 3-7.

4 3. First Supplemental Declaration of Ritu Portugal<sup>3</sup>

5 In a supplemental declaration dated April 27, 2020, Portugal declares in relevant part: (1)  
 6 the original construction on the Hotel was completed in May 2010; (2) Superb still does not own,  
 7 lease, or control any websites; (3) the screenshots depicted in the FAC appear to come from the  
 8 website “Marriott.com”; (4) Superb does not own, lease, control, or have the right to change any  
 9 portion of the “Marriott.com” website; (5) Superb can only request that Marriott make any desired  
 10 changes, which may or may not be approved or implemented; (6) the One Bedroom Suite was  
 11 converted to a King Studio on February 17, 2020 by removing a door and still does not exist; (7)  
 12 other premium accessible rooms are available to rent, including the Accessible King Studio which  
 13 is larger than Room 335 and has the same amenities; (8) Superb does not represent that it has or  
 14 had 22 suites available for rent; (9) it is unknown why the Marriott.com website would represent  
 15 that the hotel has or ever had 22 suites; (10) through inquiry, it appears that there may have been a  
 16 change in nomenclature by Marriott whereby some or all rooms that were referred to as “suites”  
 17 would thereafter be called “studios”; (11) for years preceding this lawsuit, the Hotel had 21 studios  
 18 and 1 suite; (12) since February 17, 2020, because the sole One Bedroom Suite was permanently  
 19 converted to a King Studio, there are now a total of 22 studios for rent at the Hotel; (13) Superb is  
 20 not “hiding” any suites; and (14) using the Wayback Machine technologies, in 2016 and 2017 six  
 21 types of rooms were offered, but the only suite was the One Bedroom Suite. See Doc. No. 35-3.

22 4. Second Supplemental Declaration of Ritu Portugal

23 In a second supplemental declaration dated May 22, 2020, Portugal declared in relevant  
 24 part: (1) original construction of the Hotel was completed in May 2010; (2) Superb does not own  
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26 <sup>3</sup> The Court notes that Portugal’s two Supplemental Declarations contain legal opinions and discussions, for example  
 27 regarding Fed. R. Civ. P. 11 and sanctions thereunder. Portugal’s assessments, opinions, or analyses regarding Rule  
 28 11, or any other legal matters are improper. Portugal is a fact witness. Portugal’s legal arguments should be reflected  
 only in Superb’s briefing and signed by Superb’s attorney. The Court in no way credits or considers Portugal’s  
 unnecessary and improper legal conclusions, arguments, opinions, and analyses.

1 or control any website which provides information about the Hotel or a means of reserving a  
2 room; (3) there has never been more the one suite at the Hotel (Room 335); (4) the sole suite at the  
3 Hotel was converted to a King Studio on February 17, 2020, by removing the door between the  
4 bedroom and living area; (5) the removal of the door requires that Room 335 now be offered and  
5 rented as King Studio consistent with the room descriptions at the Hotel and the Marriott system;  
6 (6) Superb was concerned that the representation on the Marriott.com website that the Hotel had  
7 “22 suites” was not accurate; (7) a representation that the Hotel had “22 studios” would be  
8 accurate; (8) because of concern about accuracy, Superb through counsel forwarded the FAC to  
9 Marriott and requested that Marriott correct the Marriott.com website; (9) Superb cannot change  
10 representations on the Marriott.com website; (10) Marriott.com currently does not allow a  
11 representation that there are “22 studios” instead of “22 suites”; (11) on May 16, 2020, Marriott  
12 changed the representation on Marriott.com to no longer reflect that the hotel has “22 suites,” but  
13 instead now shows that there are 86 guestrooms with no representations regarding suites; (12)  
14 Room 335 was converted to a King Studio from a One Bedroom Suite because there was so little  
15 difference between the rooms that there was little benefit to having the suite, but instead there is  
16 the potential for confusion among the room categories; (13) while some hotels may use the term  
17 “suite” to identify rooms that are superior to standard rooms or “studios,” that is not the case with  
18 the Hotel; (14) the same amenities available in the room category One Bedroom Suite are  
19 available in the Accessible King Studio, irrespective of the designation of the room as a “suite” or  
20 a “studio”; and (15) if Brooke had called or contacted the Hotel, she would have learned that there  
21 were room options and other efforts that could have been made to accommodate her room needs.  
22 See Doc. No. 40-1.

### 23 Legal Standards

24 Federal Rule of Civil Procedure 12(b)(1) allows for a motion to dismiss based on lack of  
25 subject matter jurisdiction. See Fed. R. Civ. Pro. 12(b)(1). It is a fundamental precept that federal  
26 courts are courts of limited jurisdiction. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374  
27 (1978); K2 Am. Corp. v. Roland Oil & Gas, 653 F.3d 1024, 1027 (9th Cir. 2011). Limits upon  
28 federal jurisdiction must not be disregarded or evaded. Owen Equip., 437 U.S. at 374; Jones v.



1 Giles, 741 F.2d 245, 248 (9th Cir. 1984). “It is presumed that a cause lies outside this limited  
 2 jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.”  
 3 Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); K2 Am., 653 F.3d at 1027. Rule  
 4 12(b)(1) motions may be either facial, where the inquiry is confined to the allegations in the  
 5 complaint, or factual, where the court is permitted to look beyond the complaint to extrinsic  
 6 evidence. See Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014); Safe Air For Everyone v.  
 7 Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). When a defendant makes a factual challenge “by  
 8 presenting affidavits or other evidence properly brought before the court, the party opposing the  
 9 motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing  
 10 subject matter jurisdiction.” Meyer, 373 F.3d at 1039; see Leite, 749 F.3d at 1121. The court  
 11 need not presume the truthfulness of the plaintiff's allegations under a factual attack. Wood v. City  
 12 of San Diego, 678 F.3d 1075, 1083 n.2 (9th Cir. 2011).

13 Mootness is a jurisdictional issue. Foster v. Carson, 347 F.3d 742, 745 (9th Cir. 2003);  
 14 White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). Because it pertains to a court's subject matter  
 15 jurisdiction, mootness is to be raised through a Rule 12(b)(1) motion to dismiss. White, 227 F.3d  
 16 at 1242. “[A] case is moot when the issues are no longer 'live' or the parties lack a legally  
 17 cognizable interest in the outcome.” Powell v. McCormack, 395 U.S. 486, 496 (1969); Pitts v.  
 18 Terrible Herbst, Inc., 653 F.3d 1081, 1086 (9th Cir. 2011). That is, if events subsequent to the  
 19 filing of the case resolve the parties' dispute, the court must dismiss the case as moot. Pitts, 653  
 20 F.3d at 1087. “The basic question in determining mootness is whether there is a present  
 21 controversy as to which effective relief can be granted.” Bayer v. Neiman Marcus Grp., 861 F.3d  
 22 853, 862 (9th Cir. 2017). Therefore, if “there is no longer a possibility that [a plaintiff] can obtain  
 23 relief for his claim, that claim is moot and must be dismissed for lack of subject matter  
 24 jurisdiction.” Foster, 347 F.3d at 745. “Because a private plaintiff can sue only for injunctive  
 25 relief (i.e., for removal of the barrier) under the ADA, a defendant's voluntary removal of alleged  
 26 barriers prior to trial can have the effect of mootng a plaintiff's ADA claim.” Oliver v. Ralphs  
 27 Grocery Co., 654 F.3d 903, 905 (9th Cir. 2011). However, the mere voluntary cessation of illegal  
 28 activity in response to pending litigation does not moot a case, unless the party alleging mootness



meets a “heavy burden” and shows that the “allegedly wrongful behavior could not reasonably be expected to recur.” Friends of the Earth, Inv. v. Laidlaw Entl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000); Southcentral Found. v. Alaska Native Tribal Health Consortium, 983 F.3d at 411, 418-19 (9th Cir. 2020).

### Discussion

#### 1. ADA Claim

##### a. Extrinsic Evidence

As noted above, in a factual attack under Rule 12(b)(1), the Court is entitled to consider extrinsic evidence. Leite, 749 F.3d at 1121; Meyer, 373 F.3d at 1039. Indeed, consideration of extrinsic evidence (i.e. evidence beyond the mere allegations in the complaint) is the defining distinction between a “facial attack” and a “factual attack” on subject matter jurisdiction. See Salter v. Quality Carriers, Inc., 974 F.3d 959, 964 (9th Cir. 2020). Therefore, nothing about the procedural posture of this case prevents the Court from considering the declarations of Superb’s Vice President (Portugal) and the Hotel’s general manager (Perez).

Brooke is correct, however, that the Ninth Circuit has warned against jurisdictional dismissals in cases involving federal question jurisdiction. See Safe Air, 373 F.3d at 1039. Brooke relies on the analysis of *Safe Air* at page 1039. In relevant part, *Safe Air* explained:

However, “jurisdictional dismissals in cases premised on federal-question jurisdiction are exceptional, and must satisfy the requirements specified in *Bell v. Hood*, 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773 (1946).” Sun Valley Gas., Inc. v. Ernst Enters., 711 F.2d 138, 140 (9th Cir. 1983). In *Bell*, the Supreme Court determined that jurisdictional dismissals are warranted “where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous.” 327 U.S. at 682-83.

We have held that a “jurisdictional finding of genuinely disputed facts is inappropriate when ‘the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits’ of an action.” Sun Valley, 711 F.2d at 139 (quoting Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983)). The question of jurisdiction and the merits of an action are intertwined where “a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff’s substantive claim for relief.” Id. See also Thornhill Publ’g Co. v. Gen. Tel. Co., 594 F.2d 730, 734 (9th Cir. 1979) (“When a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiffs’ substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the

allegations of the complaint are frivolous.”) (quotation omitted).

Id. 1039-40.

The Court does not find that this aspect of *Safe Air* controls. To be sure, there are several facets to Superb’s Rule 12(b)(1) motion. Critically, one of those facets, and the one that the Court is focusing on, is mootness. *Safe Air* did not involve a mootness challenge. The Ninth Circuit has expressly held that Rule 12(b)(1), not Rule 12(b)(6), is the proper procedural mechanism for raising a mootness challenge. White, 227 F.3d at 1242. The basis for mootness in this case is that the sole “barrier” that forms the basis of the FAC’s ADA claim has been removed and is no longer present at the Hotel. Superb backs that assertion through the declarations of Portugal and Perez. As part of the mootness challenge, Superb is not arguing that Brooke’s ADA claim is “made solely for the purpose of obtaining federal jurisdiction” or that the claim is “wholly insubstantial and frivolous.” Bell, 327 U.S. at 682-83; Safe Air, 373 F.3d at 1039. Therefore, the Court cannot find that *Safe Air* requires the Court to either utilize a Rule 12(b)(6) analysis or disregard the declarations of Portugal and Perez. Instead, because mootness is being raised, the Court will analyze mootness through Rule 12(b)(1) as a factual challenge and will consider the declarations of Portugal and Perez. See Leite, 749 F.3d at 1121; White, 227 F.3d at 1242.

b. Existence of a Barrier

The first cause of action alleges that Superb discriminated against Brooke by not providing her with an equal choice among the room types at the Hotel in violation of the ADA and SAD 224.5. See FAC ¶ 39. The factual allegations that support this cause of action are that a One Bedroom Suite is the sole type of suite offered at the Hotel, the One Bedroom Suites at the Hotel are not accessible, and the sole accessible rooms are standard rooms, which are not comparable in terms of living space, views, and luxurious amenities to the One Bedroom Suites. See FAC ¶ 13. Brooke’s allegations regarding One Bedroom Suits and rooms offered at the Hotel are based on “Defendant’s website.” See id. The FAC also alleges that “Defendant’s website” indicates that there are 22 suites available at the Hotel, none of which are accessible. See id. at ¶ 33. The screenshots of “Defendant’s website” indicate that the website is “marriott.com.” See FAC at pp. 7-8. From these allegations, the Court concludes that the basis of the first cause of action can be

1 summarized as follows: only standard rooms are accessible, the hotel offers 22 suites in the form  
2 of a One Bedroom Suite room type, Brooke wants the more luxurious suite to rent, but none of the  
3 22 One Bedroom Suites are accessible. After considering the allegations, briefing, and extrinsic  
4 declarations, the Court agrees with Superb that this barrier does not exist.

5       The sworn declarations of Perez and Portugal demonstrate that, despite the name “Fairfield  
6 Inn & Suites,” the Hotel has only ever had a single room to rent as a “suite.” That room was  
7 Room 335 and it was a “One Bedroom Suite” room type. On February 17, 2020, Room 335/the  
8 One Bedroom Suite was converted to a Studio King. By removing a door, Room 335/the One  
9 Bedroom Suite no longer qualifies as a “One Bedroom Suite” room type under the Marriott  
10 designation system. Therefore, as of February 17, 2020, the Hotel no longer has any One  
11 Bedroom Suites available to rent. Additionally, prior to February 17, 2020, the Hotel had 21 other  
12 “premium”/non-standard guest rooms known as “Studios.” There is nothing that indicates that  
13 studio room types lacked any of the premium features or amenities of the One Bedroom Suite  
14 room type. Each of the Hotel’s three studio room types (Queen, King, and Spa King) have  
15 accessible rooms. Because the FAC acknowledges that the Hotel offers accessible versions of the  
16 two standard guestrooms (Queen and King), the five room types (the two standard types and three  
17 premium types/studios) currently existing at the Hotel each have an accessible configuration that  
18 is available to rent. That is, contrary to the FAC, there is not a room type offered to rent at the  
19 Hotel that is “inaccessible.”

20       Brooke’s opposition and the FAC rely on allegations of chicanery and information  
21 contained in screenshots of “Defendant’s website.” That is, Brooke and the FAC is relying  
22 entirely on representations about the Hotel that Brooke found on the Marriott.com website,  
23 through either the website itself or the Wayback Machine. There are no allegations (or responding  
24 declarations or evidence) that suggest that Brooke has a different source of information. Superb  
25 has submitted no less than three sworn declarations that Superb does not own, lease, or control any  
26 websites, let alone websites or some kind of internet presence whereby a person could book a  
27 room or learn about the Hotel. Superb acknowledges that one can learn information about, and  
28 book rooms at, the Hotel through Marriott.com. However, Portugal’s declarations explain that this

1 is to be expected because Marriott.com is the website of the Hotel's franchisor.<sup>4</sup> As the  
2 franchisor's website, Superb cannot unilaterally make any changes to Marriott.com. Instead,  
3 Superb must request that Marriott.com make a change, the ultimate decision being left with the  
4 franchisor Marriott. Further, the website is called "Marriott.com," it is not called "Superb.com" or  
5 anything of the like. Going to Marriott.com allows a person to book rooms or access information  
6 about hotels that fall under the Marriott umbrella or franchise system, be they located within  
7 Fresno, County, a State within the United States, or cities located in foreign countries. See  
8 www.marriott.com. There is no doubt that Marriott is a large and successful hotel  
9 chain/organization with owned or affiliated hotels worldwide. The nature of the Marriott.com  
10 website plainly shows that Superb does not own the website.<sup>5</sup> Therefore, the declarations of  
11 Portugal and the nature of the Marriott.com website itself show that Superb neither owned nor  
12 controlled that website.

13       Additionally, reliance on the representation on Marriott.com about the number of rooms at  
14 the Hotel is not persuasive. Even after the One Bedroom Suite room type was removed from the  
15 available rooms at the Hotel from the Marriott.com website, screenshots from the website still  
16 indicated that 22 suites were available. Since Marriott controlled the Marriott.com website, and  
17 there is no indication that Superb could control the contents of the website, Marriott was  
18 apparently comfortable that the five room types listed above composed the 64 guest rooms and 22  
19 suites available. This is consistent with the second supplemental declaration of Portugal that  
20 Marriott.com/Marriott considered the studios and suites to be interchangeable in terms of  
21 describing the property. Further, by listing two types of "guest rooms" and three types of  
22 "studios," including one with a whirlpool, the Marriott.com website would naturally seem to  
23 suggest that there is a distinction between a studio and a guest room. This is confirmed by the  
24 declarations of Perez and Portugal which indicate that the amenities between suites and studios

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25 <sup>4</sup> "Under the Marriott brand, there are hotels that are owned and managed by the Marriott; hotels that are managed, but  
26 not owned, by the Marriott; and hotels that are neither managed nor owned by the Marriott, but retain a franchise  
27 license to use the Marriott name." DiFederico v. Marriott Int'l, Inc., 677 F. App'x 830, 831-32 (4th Cir. 2017).

28 <sup>5</sup> This is also confirmed by at least one case in which Marriott acknowledged ownership of Marriott.com through  
requests for judicial notice of contents on Marriott.com. Love v. Marriott Hotel Servs., 2021 U.S. Dist. LEXIS 41081,  
\*6 (N.D. Cal. Mar. 3, 2021).

1 were essentially identical and that the Accessible King Studio was larger than the One Bedroom  
2 Suite. Brooke has cited no evidence or presented any other screenshots that indicate that the  
3 amenities of a One Bedroom Suite and the Studios were materially different. Indeed, there is no  
4 explanation by Brooke for her assertion that the only accessible rooms available at the Hotel were  
5 standard/non-premium rooms which did not have similar amenities to the suite.

6 In sum, Brooke's complaint and opposition are based largely on the assumption that  
7 Marriott.com is Superb's website, as well as her assumption that the website's representation that  
8 the Hotel has "22 suites" means 22 One Bedroom Suites. The declarations of Perez and Portugal  
9 demonstrate Brooke's assumptions are incorrect. There is no indication that Brooke ever called  
10 the Hotel directly or obtained any further information, apart from looking at Marriott.com. If she  
11 had done so, the declarations of Perez and Portugal indicate that the Hotel would have informed  
12 her that there was only one suite in the Hotel, but that other premium/non-standard rooms were  
13 available. That is, although it would have been confirmed that the single One Bedroom Suite at  
14 the Hotel was inaccessible, her assumption that only "standard guest rooms"/"non-premium  
15 rooms" were accessible, and that 22 One Bedroom Suites were part of the Hotel would have been  
16 shown to be incorrect. The past representations found on the third-party Marriott.com website do  
17 not sufficiently undercut the declarations of Perez or Portugal, which show that every room type  
18 currently available at the Hotel (including three premium/non-standard rooms types) are available  
19 in accessible configurations. Therefore, because all room types currently available at the Hotel are  
20 available in accessible configurations, the barrier identified in the FAC that forms the basis of  
21 Brooke's ADA claim is not present.

22 c. Voluntary Cessation

23 "[A] defendant's voluntary removal of alleged barriers prior to trial can have the effect of  
24 mooted a plaintiff's ADA claim." Oliver, 654 F.3d at 905. A number of considerations in this  
25 case convince the Court that Superb's voluntary actions have mooted this matter.

26 First, Superb made a structural change to convert the sole One Bedroom Suite to a King  
27 Studio. Contrary to Brooke's opposition, Superb did submit a photos that demonstrate that the  
28 door was indeed removed from Room 335. See Doc. No. 8-7 at ¶ 5; Doc. No. 35-2. While it does

1 not appear that the structural change was particularly extensive, i.e. removing a door, the changes  
2 were nonetheless physical. This is not the same as merely changing or enforcing a written policy,  
3 and additional physical alterations would have to be made to revert Room 335 back to a One  
4 Bedroom Suite.

5 Second, there are sworn declarations that Room 335 will only be offered as a King Studio.  
6 The one caveat being that if a decision is made to revert Room 335 to a One Bedroom Studio, then  
7 a Certified Access Specialist must first certify that the Suite is accessible. However, there are no  
8 plans to do so.

9 Third, Superb appears to have twice contacted Marriott or Marriott.com regarding the  
10 representations on Marriott.com about the term “suites” and the listing of a One Bedroom Suite at  
11 the Hotel. In each instance, Superb requested that changes be made so that there would be no  
12 indication of an available suite would be listed for the Hotel. In other words, Superb engaged in  
13 affirmative conduct with a third party to remedy what appears to be the moving force behind this  
14 litigation. Those efforts were successful in that Marriott.com made changes.

15 Fourth, the Court agrees that it could be easily determined whether Superb was re-offering  
16 the inaccessible Room 335 as the Hotel’s sole One Bedroom Suite. A telephone call to the Hotel  
17 could determine whether the Hotel was offering any One Bedroom Suites, and if so, if any were  
18 accessible. Further, because Superb has demonstrated that Marriott.com will make a requested  
19 change if approved by Marriott, and because Marriott.com currently does not indicate that the  
20 Hotel has any suites available to book, a reappearance of the One Bedroom Suite at the Hotel on  
21 Marriott.com would reasonably support the inference that Superb requested and Marriott approved  
22 the reappearance/reoffering of the One Bedroom Suite.

23 Fifth, there appears to be no utility or benefit to Superb from reverting Room 335 back to a  
24 One Bedroom Suite. Since its construction in May 2010, there has only ever been a single One  
25 Bedroom Suite at the Hotel. If there were a significant demand for One Bedroom Suites, as  
26 opposed to Studios, it seems highly probable that Superb would have attempted to meet that  
27 demand by offering the public more than a single suite. Moreover, there appears to be little  
28 distinction between a One Bedroom Suite and a King Studio. The conversion of Room 335 was

1 accomplished through the removal of a door in the One Bedroom Suite. No additional amenities  
 2 were added, walls were not added or torn down, and no additional square feet appears to have  
 3 been needed. Based on the removal of the One Bedroom Suite room type at the Hotel on  
 4 Marriott.com, it appears that Marriot/Marriott.com was satisfied that Room 335 could be  
 5 considered a King Studio after the door was removed.

6 Sixth, there is no evidence that the Hotel offers only “standard rooms” in accessible  
 7 configurations, nor is there evidence that the single One Bedroom Suite was the only “premium”  
 8 room available. As indicated above, the evidence demonstrates that five room types are offered at  
 9 the hotel, two standard guest rooms and three studios. Reverting Room 335 back to a One  
 10 Bedroom Studio could expose Superb to litigation that is similar to this case.

11 Seventh, SAD 224.5 does not require every type of room at a hotel be offered in an  
 12 accessible configuration. See Brooke v. Sunstone Von Karman, LLC, 2020 U.S. Dist. LEXIS  
 13 196917, \*6 (C.D. Cal. Aug. 25, 2020). As quoted in the FAC, SAD 224.5 requires that hotels  
 14 provide “choices of guest rooms, number of beds, and other amenities *comparable* to the choices  
 15 provided to other guests.” Here, the declarations of Perez and Portugal indicate that the studio  
 16 rooms are directly comparable to the One Bedroom Suite in terms of size and amenities.<sup>6</sup> In  
 17 particular, the declarations of Perez and Portugal indicate that the Accessible King is larger than  
 18 Room 335, has similar views to Room 335, and has the same amenities as Room 335. Thus, the  
 19 evidence strongly suggests that there is no violation of SAD 224.5 simply because the single One  
 20 Bedroom Suite at the Hotel was inaccessible.

21 Finally, Brooke’s arguments regarding the significance of February 18, 2020 are  
 22 misplaced. While there was significant activity on the docket of this case on February 18, the  
 23 declarations of Perez and Portugal show that Room 335 was converted on February 17, 2020, and  
 24 not February 18, 2020.

25 Collectively, the Court is satisfied that these considerations are sufficient to show that the  
 26 “allegedly wrongful behavior could not reasonably be expected to recur.” Friends of the Earth,

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27  
 28 <sup>6</sup> Photos taken from Room 335 and the Accessible King Studio (which is seven doors down from Room 335) indicate that the views from the windows are similar. See Perez Dec. Exs. 8, 9.



528 U.S. at 189. Therefore, Superb’s voluntary correction of the barrier alleged in the FAC moots this case.

d. Conclusion

The declarations and exhibits submitted in support of Superb’s Rule 12(b)(1) factual attack demonstrate that a One Bedroom Suite is no longer offered at the Hotel, it is not reasonably expected that Superb would reconvert and relist the inaccessible Room 335 as the Hotel’s sole One Bedroom Suite, and accessible configurations of all five room types at the Hotel (including three premium room types) are available for booking. The contrary allegations in the FAC are based on incorrect assumptions and interpretation of a third party website that is not owned, leased, or controlled by Superb. Therefore, Superb’s Rule 12(b)(1) motion to dismiss the ADA claim on the basis of mootness will be granted.

2. Unruh Act Claim

The Unruh Act limits its scope to “[a]ll persons within the jurisdiction of [California].” Cal. Civ. Code § 51(b). Recognizing this scope, several District Courts have found Brooke’s allegation that she maintains an office in San Jose, California for the purpose of ADA testing to be insufficient, by itself, to fit within the Unruh Act’s limited scope. See Brooke v. Inn at Jack London Square LLC, 2020 U.S. Dist. LEXIS 182464, \*11-\*12 (N.D. Cal. Aug. 28, 2020); Brooke v. IA Lodging Santa Clara LLC, 2020 U.S. Dist. LEXIS 119897, \*8-\*9 (N.D. Cal. July 8, 2020). The reasoning of these courts is essentially that the mere allegation of a California office does not demonstrate that an Arizona resident was actually discriminated against while she was in California. See Inn at Jack London Square, 2020 U.S. Dist. LEXIS 182464 at \*11-\*12; IA Lodging, 2020 U.S. Dist. LEXIS 119897 at \*8-\*9; see also Brooke v. Cosumnes River Land LLC, 2020 U.S. Dist. LEXIS 75618, \*10-\*11 (E.D. Cal. Apr. 28, 2020); Brooke v. RIHH LP, 202 U.S. Dist. LEXIS 27266, \*11-\*12 (N.D. Cal. Feb. 18, 2020). The Court finds this to be a reasonable and common sense application of the Unruh Act and its limitation to people “within the jurisdiction of [California].”

As applied to this case, the FAC only alleges Brooke’s Arizona residence and the existence of her California office. The FAC does not allege that Brooke was in her San Jose office when she

1 experienced the alleged discrimination. Therefore, dismissal of Brooke's Unruh Act claim for  
 2 lack of standing is appropriate. Inn at Jack London Square, 2020 U.S. Dist. LEXIS 182464 at  
 3 \*11-\*12; IA Lodging, 2020 U.S. Dist. LEXIS 119897 at \*8-\*9.

4 It is not clear that amendment would be futile in terms of Brooke's standing.<sup>7</sup> However,  
 5 the Court has found that Brooke's ADA claim is moot. When all federal claims have been  
 6 dismissed, courts have discretion to decline to exercise supplemental jurisdiction over the  
 7 remaining state law claims. See 28 U.S.C. § 1367(c)(3). The general rule is "when federal claims  
 8 are dismissed before trial . . . pendent state claims should also be dismissed. Religious Tech. Ctr.  
 9 v. Wollersheim, 971 F.2d 364, 367-68 (9th Cir. 1992). Considering the early procedural posture  
 10 of this case (a scheduling order has not yet been entered), for purposes of permitting amendment,  
 11 the Court will exercise its discretion and decline to exercise supplemental jurisdiction over the  
 12 FAC's Unruh Act claim. Therefore, even if Brooke can correct her standing problem and allege  
 13 that she experienced discrimination while she was in her San Jose office, application of §  
 14 1367(c)(3) would nevertheless result in the ultimate dismissal of that claim in this Court.  
 15 Therefore, the Court will dismiss Brooke's Unruh Act claim without leave to amend.

## 16 17 18 **II. Superb's Rule 56(a) Motion & Brooke's Rule 56(d) Motion**

19 The Court has found that Brooke's ADA claim is moot. Further, a lack of adequately pled  
 20 standing and application of § 1367(c)(3) has led to the dismissal of Brooke's Unruh Act claim. In  
 21 other words, all causes of action have been resolved. Under these circumstances, Superb's motion  
 22 for summary judgment is moot and will be denied as such. Similarly, with the denial of Superb's  
 23 motion for summary judgment, Brooke's Rule 56(d) motion is also moot and will be denied as  
 24 such.

25  
26  
27 <sup>7</sup> The Court notes that the declarations of Perez and Portugal, particularly the paragraphs that describe the amenities,  
 28 size, and view of the One Bedroom Suite compared to the Accessible King Studio, suggest that amendment would be  
 futile based on the substantive merits of the claim. However, the Court limits its holding to the issue of standing.

1 **III. Motion To Amend**

2 *Plaintiff's Argument*

3 Brooke alleges that since filing this lawsuit, she recently personally encountered another  
4 barrier at the Hotel. Brooke went to the Hotel after receiving notice that 1 of the 22 One Bedroom  
5 Suites had been remediated. When Brooke went to the Hotel, the Hotel's lobby loading zone (the  
6 area right outside the lobby where families park to check in) did not have a compliant access aisle  
7 as is required by SAD 503. The proposed Second Amended Complaint explains that Brooke  
8 parked her car at the lobby zone, but could not access the lobby from the lobby loading zone. The  
9 Hotel did not have a striped access aisle at the lobby loading zone, and there were two vehicles  
10 blocking Brooke's access to the lobby. The vehicles were parked where the access aisle should  
11 have been. The access aisle indicates where persons should not park, thereby giving a free access  
12 for a person in a wheelchair. Because of the non-compliant lobby loading zone, Brooke was not  
13 provided full and equal access to the Hotel and lobby and thus, was deterred from lodging at the  
14 Hotel again. Brooke argues that the relevant Rule 15 considerations favor amendment and  
15 permitting her to pursue an ADA claim and an Unruh Act claim based on a non-conforming lobby  
16 loading zone access aisle. However, Brooke states that she anticipates that Superb will have  
17 remediated the access aisle by August 2020, so she has a reservation to lodge at the Hotel in  
18 August 2020. Finally, Brooke states that if the Court declines to permit amendment, then she will  
19 file a second lawsuit based on the access aisle.

20 In reply, Brooke argues that the proposed SAC contains plausible claims based on  
21 violations of SAD 503. Superb's arguments largely rely on procedural technicalities that are of  
22 little consequence because the same standards govern Rule 15(a) and Rule 15(d). Judicial  
23 economy and Ninth Circuit precedent counsel in favor of granting this motion.

24 *Defendant's Opposition*

25 Superb argues *inter alia* that Brooke's motion is defective in terms of seeking an  
26 amendment. Because the proposed claims arise after the lawsuit was filed, Brooke should have  
27 moved to file a supplement under Rule 15(d). Further, the proposed amended complaint does not  
28 state plausible claims regarding the access aisle. Because the Hotel was built in May 2010, the

2010 Standards of Accessible Design, including SAD 503, do not apply to the Hotel. The 2010 Standards apply to improvements made after March 15, 2012. Instead, the Hotel only needs to comply with the 1991 Standards. The relevant standard, the 1991 Americans with Disabilities Act Accessibility Guideline (“ADAAG”) 4.6.6 does not require signage or marking/stripping the lobby loading zone access aisle.

In a supplement, Superb states that it has now posted signs that state no parking or stopping is permitted in front of the lobby entrance and that violators will be towed.

### Legal Standard

Federal Rule of Civil Procedure 15 governs amended and supplemental pleadings. To add claims that are based on conduct that occurred prior to the filing of a pleading, the proper procedural mechanism is an amendment through Rule 15(a). Eid v. Alaska Airlines, Inc., 621 F.3d 858, 874 (9th Cir. 2010). Under Rule 15(a), if a party can no longer amend a pleading as a matter of course, then the “party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) motions are generally granted with extreme liberality. C.F. v. Capistrano Unified Sch. Dist., 654 F.3d 975, 985 (9th Cir. 2011). To add claims that are based on conduct that occurred after the filing of a pleading, the proper procedural mechanism is a supplement through Rule 15(d). Eid, 621 F.3d at 874. In relevant part, Rule 15(d) provides that “the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. . .” Fed. R. Civ. P. 15(d). Rule 15(d) is a tool of judicial economy and efficiency that enables a court to provide more complete relief without the necessity of separate actions; as long as the supplement has “some relation” to the original pleading, Rule 15(d) supplementation is a favored procedure. Keith v. Volpe, 858 F.2d 467, 473-74 (9th Cir. 1988). The same factors are generally considered in deciding either a Rule 15(a) or Rule 15(d) motion. See United States ex rel. Gadbois v. PharMerica Corp., 809 F.3d 1, 7 (1st Cir. 2015); Franks v. Ross, 313 F.3d 184, 198 n.15 (4th Cir. 2002); Lyon v. ICE, 308 F.R.D. 203, 214 (N.D. Cal. 2015); Fresno Unified Sch. Dist. v. K.U., 980 F.Supp.2d 1160, 1175 (E.D. Cal. 2013).

1        Discussion

2        Procedurally, Brooke's motion is improper. Because the basis of the additional ADA and  
3 Unruh Act claims is conduct that occurred after the filing of the FAC, Brooke's motion should  
4 have been brought under Rule 15(d), not Rule 15(a)(2). Eid, 621 F.3d at 874. However, unlike in  
5 Eid, Brooke's reply shows that she is not insisting that her motion to amend be considered purely  
6 under an inapplicable rule. Further, because the parties address the substance of Brooke's motion,  
7 and because the standards for deciding Rule 15(a)(2) and Rule 15(d) motions are generally the  
8 same, the Court will not deny Brooke's motion simply because she initially invoked Rule 15(a)  
9 instead of Rule 15(d).

10        Substantively, however, there is a problem with the proposed second amended complaint.  
11 Brooke's reply confirms that the proposed second amended complaint is based on the 2010  
12 Standard for Accessibility, specifically SAD 503. ADA regulations clarify that "[i]f physical  
13 construction or alteration commence after July 26, 1992, but prior to September 15, 2010, then  
14 new construction or alterations subject to this section must comply with either UFAS or the 1991  
15 Standards . . . ." 28 C.F.R. 35.151(c)(1). The evidence before the Court is that construction of the  
16 Hotel was completed in May 2010. Because the Hotel was completed in May 2010, the 1991  
17 Standards apply to the Hotel; the 2010 Standards, and in particular SAD 503, have no apparent  
18 application. See id.; Johnson v. In Suk Jun, 2020 U.S. Dist. LEXIS 207488, at \*11-12 (N.D. Cal.  
19 Nov. 5, 2020); see also Rutherford v. Lucatero, 2020 U.S. Dist. LEXIS 81127, \*10-\*11 (C.D. Cal.  
20 Feb. 24, 2020) (explaining that the time of construction or alteration determines which set of  
21 standards a building must meet).

22        Brooke's proposed second amended complaint does not explain the basis for concluding  
23 that SAD 503 applies to the Hotel. Similarly, Brooke's reply does not reply to several critical  
24 arguments in Superb's opposition. Brooke does not respond to Superb's assertion that the 2010  
25 Standards do not apply, that the 1991 Standards do apply, and that the particular subpart of SAD  
26 503 that is actually at issue (SAD 503.3.3, which requires markings to discourage cars from  
27 parking in an access aisle) is not a requirement that is part of the 1991 Standards (in particular  
28 1991 ADAAG 4.6.6.). Brooke's failure to address these arguments can be considered a

1 concession of the points. See Warnshuis v. Bausch Health U.S., LLC, 2020 U.S. Dist. LEXIS  
2 10736, \*6 n.1 (E.D. Cal. June 18, 2020).

3 Without more from Brooke, the Court concludes that the proposed second amended  
4 complaint is attempting to find violations of the ADA and the Unruh Act based on an inapplicable  
5 standard, SAD 503. Because there is an insufficient indication that SAD 503, and in particular  
6 SAD 503.3.3, has any application to Superb/the Hotel, the Court concludes that permitting  
7 amendment would be futile.<sup>8</sup> Futility is alone a sufficient basis to deny amendment under Rule  
8 15. See Hooper v. Shinn, 985 F.3d 594, 622 (9th Cir. 2021); Gadbois, 809 F.3d at 7. Therefore,  
9 Brooke's motion to amend will be denied.<sup>9</sup>

#### 11 **IV. ADMINISTRATIVE MATTERS**

12 This order ends the substantive aspects of this case. However, because there are three  
13 motions for sanctions pending, the Court will not order the closure of the case at this time. The  
14 Court will address the pending sanctions motions in separate orders. Upon resolution of the  
15 pending sanctions motions, the Court will order the closure of the case.

16 Additionally, Document No. 53 on the Court's docket is a document that re-notices  
17 numerous motions by Superb. However, Document No. 53 was filed as a multi-part motion.  
18 Because the effect of Document No. 53 is to double the true number of pending motions, the Court  
19 will deny Document No. 53 as a pending motion. The denial is purely administrative and does not  
20 affect the analysis of this order or the pending motions for sanctions.

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22 <sup>8</sup> The Court notes that the proposed second amended complaint also included allegations regarding "Defendant's  
23 website" that sought to clarify that the Marriott.com was Defendant's official website for learning about the Hotel and  
24 making reservations. However, that allegation does not change the facts established in the Perez and Portugal  
25 declarations that demonstrate that the Hotel only had one suite, the one suite was converted to a King Studio, all room  
types offered at the Hotel have an accessible configuration available to rent, and Superb does not own, lease, or  
control Marriott.com or the contents thereof. In other words, the additional allegations do not change the fact that  
Brooke's "room type" discrimination claim is moot.

26 <sup>9</sup> The Court notes that Brooke did not address Superb's argument or the corresponding pictures that demonstrate that  
27 the Hotel no longer permits any cars to park or stop in front of its lobby. Superb's actions have arguably remedied  
28 any violation of SAD 503 and would make any ADA claim premised on a violation of SAD 503 futile. However,  
because the Court finds that Brooke has not sufficiently explained how SAD 503 applies to the Hotel, the Court need  
not decide what affect Superb's new policy and signage actually have. It is enough to note that there are additional  
issues that appear to undercut Brooke's motion to amend.

**ORDER**

Accordingly, IT IS HEREBY ORDERED that:

1. Defendant's Rule 12(b)(1) motion to dismiss (Doc. No. 44) is GRANTED as follows:
  - a. Plaintiff's ADA claim is DISMISSED without leave to amend as moot;
  - b. Plaintiff's Unruh Act claim is DISMISSED for lack of standing and without leave to amend through application of 28 U.S.C. § 1367(c)(3);
2. Defendant's Rule 56 motion for summary judgment (Doc. No. 44) is DENIED as moot;
3. Plaintiff's motion for Rule 56(d) relief (Doc. No. 64) is DENIED as moot;
4. Plaintiff's motion to amend (Doc. No. 54) is DENIED; and
5. The "motions" at Doc. No. 53 are DENIED in their entirety as being erroneously filed as "motions."

IT IS SO ORDERED.

Dated: March 29, 2021

  
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SENIOR DISTRICT JUDGE